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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 758

NATIONAL DAIRY PRODUCTS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A–1 to A–34) is reported at 350 F. 2d 321. The opinion of the district court denying petitioner's post-trial motions (Pet. A–37 to A–60) is reported at 231 F. Supp. 663.

JURISDICTION

The judgment of the court of appeals (Pet. A–35) was entered on August 27, 1965. A timely petition for rehearing was denied by the court of appeals on September 23, 1965 (Pet. A–36). On October 6, 1965, Mr. Justice White extended the time for filing a petition of certiorari to November 23, 1965. The petition was filed on November 22. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it denied petitioner's motions to inspect the transcript of the grand jury testimony of witnesses at the trial whose recollection the government attempted to refresh by their grand jury testimony under careful safeguards prescribed by the court.

2. Whether the district court correctly instructed the jury concerning the application of Section 3 of the Robinson-Patman Act to sales below cost made for the purpose of destroying competition.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, and Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, are printed (in pertinent part) at p. 3 of the petition. Rule 6(e) of the Federal Rules of Criminal Procedure is printed (in pertinent part) at p. A–71 of the petition.

STATEMENT

National Dairy Products Corporation (National) is a large company that processes, manufactures, and sells throughout the Nation dairy products and other foods. Through its Sealtest Foods Division, it operates a plant in Kansas City, Missouri, which processes and distributes milk in paper cartons for sale in the greater Kansas City area and in rural communities in Missouri and Kansas. After a two-month trial, National was acquitted on two counts and convicted on 13 counts of an indictment charging it with having conspired to fix prices and eliminate competi-

tion in the sale of milk, in violation of Section 1 of the Sherman Act, and with having sold milk below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act.[1] The violations were committed in the greater Kansas City area and in 5 rural markets. There was a Sherman Act and a Robinson-Patman Act charge in each rural market; and two Sherman Act charges (covering different periods) (counts 11 and 12) and one Robinson-Patman charge (count 13) in the greater Kansas City market.

1. THE EVIDENCE

The evidence showed that National had conspired with its competitors in the Kansas City market and with its independent distributors in the rural markets to fix milk prices, and that it had sold milk at below-cost prices for the purpose of driving other dairies out of business or subjecting them to National's pricing policies. The primary targets of

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[1] Before commencement of the trial, two interlocutory appeals were taken directly to this Court. *United States* v. *Wise*, 370 U.S. 405, held that corporate officials are personally liable under the Sherman Act for actions on behalf of their corporation which violate the act. *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, held that Section 3 of the Robinson-Patman Act, which makes it a crime to sell "at unreasonably low prices for the purpose of destroying competition * * *," was not unconstitutionally vague as applied to the instant indictment, which specifically charged that the unreasonably low prices in this case were sales below cost.

The appellee in *United States* v. *Wise*, Mr. Raymond J. Wise, a vice president and director of National, formerly in charge of its Sealtest Central Division, was also convicted. He did not perfect an appeal from the conviction.

National's predatory campaign were small dairymen selling low-priced milk in glass gallon jugs which competed heavily with National's milk in paper cartons.

In the five rural markets, National conspired to fix prices with independent dairy distributors who purchased milk from its Kansas City plant and resold it locally. National concedes that during the relevant period it sold milk in these markets below its own cost for raw milk plus processing and packaging (Pet. 7).

National conducted its campaign against its competitors in the rural markets by obtaining from its independent distributors in those markets an agreement to follow resale prices set by National in return for a guarantee that they would enjoy a gross profit margin no matter how low prices might be set (Tr. 2913, 2918–2921, 3325–3330, 3872–3875, 3938, 4058–4060, 4093–4094, 4207, 4215–4217). By lowering these resale prices, National could regulate the price spread between paper half-gallons of Sealtest and cartons or glass gallon jugs sold by local competitors. And by keeping its local prices at a low level for a period, even though it operated at a temporary loss in those markets, it could attract most of its competitors' customers. The small operators with which it competed could not withstand such pressures. National used its power to force several small family dairies and jug dealers out of business entirely (Tr. 4179–4181, 3103, 3164, 4227–4233, 4257–4268); and to force others to stop handling jugs (Tr. 4057–4066), or at least to comply with its directions as to the proper price dif-

ferential which should exist between jugs and paper cartons (Tr. 3361, 3404, 3408, 3528, 4300–4312).

In the Greater Kansas City market, National conspired to fix prices during two different periods (September–October 1957 and June–October 1958), and sold below its fully allocated costs in that market between July 14 and August 27, 1958.

The first price fixing conspiracy involved National and Raymond J. Wise, head of its Sealtest Central Division (Pet. 4; see p. 3, n. 1, *supra*), and three other dairies—Borden Company, Fairmont Foods Company, which operated Country Club Dairy, Foremost Dairies, Inc., and certain of their officials. There were two targets of the conspiracy—the glass jug operators and Hawthorn Mellody Dairy which had been selling milk to Milgrim Food Stores at a 13 percent discount. (Tr. 341, 6131.)

The conspiracy was carried out through a series of phone calls and meetings in Kansas City and in National's Chicago office (*e.g.*, Tr. 1009–1016, 418–419, 457–462; 6300, 1618, 674; 1620, 1623; 668–670; 242–245; 1624–1627, GX 167–A), as a result of which the price for a half-gallon of milk in cartons sold by the conspiring dairies moved in less than a month from 37¢ down to 33¢, then up to 41¢ and back down to 39¢ (GX 101, 104, 104A; Tr. 1804). During this price maneuvering, the gallon jug operators were warned that the spread between jug and carton would have to be narrowed to no more than a 5¢ differential (Tr. 707, 2365–2367, 668–672, 1044–1046, 1669–1670, 2357–2358).

By the spring of 1958, the Kansas City milk market was again highly competitive. National proposed a plan under which prices would be lowered until the competition was weakened, and then raised. Its co-conspirators, Borden Company, Fairmont Foods Company, and Foremost Dairies, Inc., initially rejected this proposal, but they subsequently joined in executing it.

Between June and October 1958, there was an elaborate series of meetings, phone conversations and communications involving National, Borden, Fairmont, Foremost and occasionally Hawthorn Mellody. Discussions of milk pricing took place in Wise's hotel room in Kansas City and St. Louis; in his Chicago office; among local officials of the dairies involved, and elsewhere (*e.g.*, Tr. 922–923; 273, 278–280, 925–926; 928–930; 1070–1072; 541, 6413, 6417; 938–939, 874–875, 1266; 1614–1616; 295–296, 1278; 1645–1646, 880, 2470–2471, 1553; 6434–6435, 879; 654, 882, 6435–6436; 883–884, 948–951, 1104–1105, 1777–1780; 949–951, 1104–1109). National's object was to obtain a "sound" market, which it defined as one from which gallon jugs, spot pricing and two-for-one sales, as well as the Milgrim discount, had been eliminated (Tr. 270–278).

The other dairies first attempted to raise prices on July 1, 1958, but the attempt failed because National would not join (Tr. 872, 939, 1042, 1206, 1209, 6474, 1804). The dairies then adopted the first step in National's plan. On July 14, 1958, all major dairies but one (which was not a member of the conspiracy), reduced milk prices (GX 103). A week later they

dropped by-product prices (Tr. 6434–6435, GX 108). Then on August 1, Borden, Fairmont, Foremost and Hawthorn Mellody adopted a discount schedule proposed by National which eliminated the Milgrim stores discount (GX 109).

The agreed-upon price cuts forced the jug operators to comply with the conspirators' instructions concerning the price at which they would sell milk (Tr. 2098–2099, 2244, 2252–2253, 2369). By August 27, 1958, the conspirators could safely raise their prices, which they did simultaneously; they again raised them simultaneously in October (GX 103, 108).

During the entire July 14–August 27 period, National sold below its fully allocated cost. In August it was selling for 6¢ below its total plant and delivery costs (GX 17), and it suffered losses of more than $46,000 in July and more than $73,000 in August on its operations in the greater Kansas City area. After the August 27 rise, it was breaking even on its daily unit sales (GX 103, 108); after the October rise it began to make a profit (GX 103, 108).

2. THE GRAND JURY TRANSCRIPT

During trial of the Kansas City charges (counts 11, 12 and 13) the government requested leave of the court to refresh the recollection of certain witnesses who had testified before the grand jury by reading to them portions of their grand jury testimony. The trial judge established in advance a procedure for handling such requests, to which petitioner did not object (Tr. 425–452). Instead, it moved for disclosure of the portions of the grand jury transcript

which the government proposed to use in attempts at refreshment and also the related portions (Tr. 447; Pet. A–77, A–102 to 103, A–120 to 121, A–127). The motion was denied. Thereafter, under close supervision by the court, the transcript was used in attempts (only a few of which produced affirmative testimony) to refresh seven witnesses, all of them officers or employees of the dairy companies involved (Pet. A–73–74).[2] The court repeatedly instructed the jury that only the witness' present recollections were to be considered as evidence (*e.g.*, Tr. 449–452; 1278–1279; 6368–6369). Petitioner never objected that the transcript was being used to impeach or as substantive evidence (Pet. A–19).

3. THE CHARGE TO THE JURY

The trial judge's charge to the jury (Tr. 7059–7201) discussed separately the Sherman Act (Tr. 7092–7116) and the Robinson-Patman Act (Tr. 7116–7147), and then specifically charged on each count individually (Tr. 7149–7196). As to the Robinson-Patman Act, the judge emphasized that proof of intent to sell at unreasonably low prices was required by the statute. He also charged that it was for the jury to determine "whether or not the prices National charged were below cost and were unreasonably low" (Tr. 7143). The jury found National guilty on six counts under the Robinson-Patman Act and seven counts under the Sherman Act.

[2] See Tr. 453–456; 475–476; 498–503; 506–507; 515–521; 534–538; 637–640; 641–644; 825–829; 1006–1008; 1012–1014; 1018–1021; 1033–1035; 1073–1078; 1082–1083; 1097–1100; 1238–1240; 1250–1252; 1276–1279; 5523–5524; 6361; 6362–6363; 6365–6371; 6415–6417.

4. THE DECISION OF THE COURT OF APPEALS

After the district court had denied petitioner's post-trial motions (Pet. A–37 to A–60), petitioner appealed on a broad range of issues. The court of appeals discussed the principal contentions in detail (Pet. A–1 to A–34). It held, *inter alia,* that the district court had not abused its discretion in denying defendants' motion to inspect the portions of the grand jury transcript relating to the material used in attempts at refreshment (Pet. A–17 to A–22), and that the court's charge to the jury was not erroneous (Pet. A–22 to A–30). It concluded (Pet. A–34):

> This prosecution has produced a history of every conceivable motion and numerous legal memoranda. The case has twice been to the Supreme Court. From the filing of the indictment to the filing of the notice of appeal fourteen volumes of "pleadings" have been amassed. In such a hotly contested and protracted legal battle, mistakes do occur. "The human element cannot be eliminated from lawsuits." But, as always, the crucial question is, were there any mistakes or errors of a prejudicial nature? We conclude there were not.

ARGUMENT

1. The court of appeals properly concluded that the trial judge did not abuse his discretion when he determined that in the circumstances of this case it was not necessary to disclose to defense counsel portions of the grand jury transcript in addition to those which had been used to refresh the recollections of certain witnesses.

The grand jury transcript was used during trial of the Kansas City charges in 24 attempts to refresh the recollections of seven witnesses. Five of these witnesses had been named in the indictment as individual co-conspirators; four were officers or employees of petitioner; one was a former sales manager of, and was still employed by, Fairmont Foods Co., a corporate co-conspirator; and one was the former sales manager of Hawthorn Mellody Dairy. These witnesses had proved to be hostile, evasive and forgetful when questioned by the government.

To avoid any possible prejudice to defendants, the court limited the government's use to the minimum necessary to refresh and required strict observance of procedures designed to prevent any abuse. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 231–237.[1] *First,* the government was required to mark and identify in advance to the court not only the particular grand jury testimony that might be used for refreshment but also all related material. *Second,* the court reviewed the entire subject matter and itself determined whether any question would have the effect of refreshing the witness' memory (Tr. 435, 440, 441, 1222). *Third,* the court declared that it would con-

[1] In *United States* v. *Socony-Vacuum Oil Co.*, grand jury minutes were used to refresh some 90 times without disclosure of additional portions to defense counsel. This Court held that disclosure was a matter for the discretion of the trial judge and that its discretion is not abused if: the grand jury transcript is used solely for refreshment, not impeachment; the court devises an appropriate procedure to prevent use of the material as affirmative evidence or for impeachment; the jury is properly instructed; and the entire procedure is administered fairly. 310 U.S., pp. 231–237.

sider unfair and would bar any attempts to refresh with statements that the witness had recognized as mistaken and had later corrected before the grand jury (Tr. 434). *Fourth*, the transcript was not to be shown to the witness. Government counsel were required to refresh in substantially the same language as the testimony before the grand jury. They were forbidden to read in "an accusatory manner" or with "histrionics" or to attempt in any other manner to "wool the witness around" (Tr. 436). The court retained the original transcript to follow the reading by government counsel (Tr. 443). *Fifth*, the court stated that it would modify the procedure if experience showed that the interests of fairness required it (Tr. 447–448).

Before any attempt had been made to refresh any witness, petitioner moved to examine portions of the transcript relating to the subject matter of the proposed refreshment, which portions the government had marked and submitted to the court (Tr. 447). The court denied the motion. Petitioner never moved for specific disclosure after a witness' recollection was actually refreshed. Nor did petitioner ever object on the ground that the minutes were being used to impeach or as substantive evidence. It is the trial judge's denial of petitioner's blanket motion for examination of the transcript that petitioner asks this Court to review.

Every assessment of demands for disclosure of grand jury testimony begins with the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United*

States v. *Procter & Gamble,* 356 U.S. 677, 681; *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399; *United States* v. *Socony-Vacuum Oil Co., supra,* pp. 231–237; F.R. Crim. P. 6(e). The policy is concerned with protection of the grand jury's effectiveness as an instrumentality for uncovering crime. One of the primary reasons for grand jury secrecy in antitrust cases "is to encourage all witnesses to step forward and testify freely without fear of retaliation. The witnesses in antitrust suits may be employees or even officers of potential defendants, or their customers, their competitors, their suppliers. The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *United States* v. *Procter & Gamble, supra,* p. 682.

Inevitably, narrowly limited departures from the policy are required. Witnesses at trial do not always testify as freely as in the grand jury room. Because of the inability or unwillingness of a witness to remember at the time of trial, the government sometimes is under a compelling need to use the grand jury minutes, as it did here, to refresh the witness' recollection. When the grand jury transcript is used in this manner, defendants have an interest in assuring that testimony developed through its use is not distorted, inaccurate, or the product of improper suggestion. A witness' grand jury testimony may contain passages which contradict, qualify, or explain the passages relied upon by the government. Defendants here desired to search through all related

portions of the grand jury transcript for such material, arguing that the use of the transcript by the government for purposes of refreshment automatically creates a particularized need for the broader breach of secrecy entailed by defendants' search of the related portions of the transcript.

Competing interests thus exist: the interest, oft-recognized by this Court, in preserving the secrecy of grand jury proceedings, and the interest of defendants in assuring that use of the minutes to refresh does not unfairly prejudice them. The court of appeals in this case, like this Court in the cases cited *supra,* recognized that a proper balancing of the weight of defendants' needs against the weight to be accorded protection of the grand jury's functions by maintaining maximum secrecy requires that much be left to the sound discretion of the trial judge. Rigid rules cannot determine whether a particularized need for a further breach in secrecy has been established. The trial judge can, for he has observed the evidence unfolding before him and he will guide the jury in considering it.

In this case no question is presented concerning the use of the grand jury transcript to impeach, or its independent use as affirmative evidence (Pet. 16, n. 28).[4] Nor does this case involve the denial of spe-

[4] Petitioner apparently had no fear that the limited use of the grand jury transcript at the trial might have had the incidental effect of impeaching the witnesses or serving as affirmative evidence since it did not raise this question in its motions to the trial court, nor did it request that the excerpts be read to the witnesses out of the presence of the jury. Thus no such problem is presented here. Moreover, the trial judge carefully

cific motions for disclosure made after particular instances of successful refreshment and based on an asserted need for further disclosure to meet particular testimony developed in those specific instances. The only grand jury question that this record presents is whether, in this particular proceeding, the trial judge abused his discretion under the standards of *Socony-Vacuum*[5] in denying a broad motion that matter in the grand jury transcript relating to portions used by the government in *attempts* at refreshment must be disclosed whether or not the attempt produced affirmative testimony. We submit he did not.

Great care was taken in observing the safeguards prescribed by the court. Government counsel recognized that if the witness' recollection was not refreshed, "that is the end of it" (Tr. 5521). To ensure that the jury did not treat as evidence the extracts read to witnesses, the court carefully (and repeatedly: Tr. 449–452; 564; 829–830; 1278–1279; 6368–6369; 7074–7075) instructed them as follows: If the witness said that his recollection had been refreshed by hearing his grand jury statements and that his present testimony was in accord with his earlier testimony, "that is evidence in the case." But if the witness said that the reading did not help him recall, "then you are not to consider the questions and answers that he gave before the grand jury as evidence in this case" (Tr. 449–452). On various occasions, the court

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guarded against such a possibility by repeatedly instructing the jury that if the recollection of the witness was not refreshed, the excerpt read from the grand jury transcript must be disregarded.

[5] Petitioner does not ask that *Socony-Vacuum* be reexamined.

refused government requests to refresh with certain extracts because, in the court's view, they did not tend to refresh or because a proper predicate had not been laid (Tr. 1005; 1220–1221; 1034; 1249; 6367). It promptly corrected a reading which deviated from the actual transcript (Tr. 1251–1252) and explained the context of material to be sure the witness understood it (Tr. 642–643; 826–827).

Petitioner was not prejudiced by the government's efforts to refresh. On only three occasions out of 24 attempts did witnesses declare they were refreshed (Tr. 1021, 1035, 1083). In six other instances the witnesses testified, in substance, that, while not refreshed, "if that is what I said before the grand jury it must be true" (Tr. 636–640; 825–829; 1006–1008; 1097–1100; 1238–1240; 6413–6417). Petitioner did not move to strike any of this testimony on the ground that it did not represent present recollection. On the fifteen other occasions, the witness testified that he was not refreshed, and the matter was at an end.[6]

The little affirmative testimony actually produced by refreshment proved to be either cumulative or peripheral. Thus, petitioner's contention that the refreshment proved "critical to the prosecution" (Pet. 14) is without foundation.[7]

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[6] Tr. 453–456; 473–476; 498–503; 505–508; 515–521; 534–537; 641–644; 1012–1014; 1073–1078; 1248–1252; 1275–1279; 5523–5524; 6353–6361; 6364–6371; 6413–6417.

[7] Petitioner points to only two examples of allegedly "substantial prejudice" (Pet. 5, n. 5). But in both of these the witness clearly stated that he was not refreshed and no affirmative evidence was produced which petitioner would have "to explain or place in perspective" (Pet. 5). In one example, government counsel, after first reminding the witness that he had

2. The court of appeals found that the trial judge's five-hour charge on the eight Sherman Act and seven Robinson-Patman Act counts was exhaustive, comprehensive and fair (Pet. App. A–23).

Under the court's instructions on the Robinson-Patman Act counts, the jury was to decide whether National had sold below cost. Whether it found sales below direct cost, or above direct cost but below fully distributed cost, it was to assess the relevant business evidence to determine whether the sale prices were unreasonably low (Tr. 7141–7144). It was told that it could not find sales prices below cost to be unreasonable if they were in furtherance of a legitimate commercial objective, such as to meet the lawful, equally low price of a competitor (Tr. 7125–7140). And it was repeatedly instructed that it could not convict unless it also found a specific intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146).

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later testified before the grand jury to a 27 cent figure in a price list, read an earlier extract relating to a 25 cent figure. Following the reading, the witness firmly testified that the figure was 27 cents and explained why the earlier grand jury testimony had been inaccurate (Tr. 1073–1078). Petitioner did not move to have the later grand jury testimony read to the witness, nor was such a motion necessary in view of the affirmative testimony. The second example related to grand jury testimony by a National official that gallon jug operators had been a small competitive factor in Kansas City. The witness stated that he did not remember this and the court made it plain to the jury that no affirmative testimony had been produced (Tr. 5523–5524).

In *United States* v. *Socony Vacuum Oil Co.*, *supra*, the Court noted that the record in that case, even without the little affirmative testimony produced by refreshment, established all the facts needed to prove the illegal conspiracy. This was equally true here.

(*a*) In *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, this Court ruled that Section 3 of the Robinson-Patman Act was not unconstitutionally vague as applied to "sales made below cost without legitimate commercial objectives and with specific intent to destroy competition" (372 U.S., p. 37). It did not undertake to define whether "costs" meant sales below direct costs or sales below fully distributed costs, since the proof might show that National's sales had been below any of these levels. 372 U.S., pp. 34–35. This was subsequently proved to be the case in five of the six markets here involved, because, in the rural markets, National concededly (Pet. 7) had sold below its direct costs. As to the lone remaining count under Section 3 (Kansas City, count 13), the issue of direct versus fully distributed costs does not merit review.

The charge plainly did not *require* the jury to convict if it found sales below fully distributed cost. To convict, the jury necessarily had to find that National had a specific predatory intent to destroy competition (Tr. 7122–7124, 7136, 7140, 7141, 7146); that it was deliberately selling at least below its "total costs, calculated on an average unit basis" (Tr. 7143); and that the sales had not been made in furtherance of a legitimate commercial objective (Tr. 7125–7140). The reasonableness of National's pricing was tested under instructions which expressly set this determination in a framework of common sense and common business experience (Tr. 7128–7129). That National's prices were above its direct costs in Kansas City, but below its fully distributed costs per unit, as proved from its

own records, did not make them reasonable. Sales deliberately and unjustifiably made below established business criteria such as fully distributed costs, and coupled with a predatory intent, fall squarely within the prohibition of the statute.

(*b*) There is no basis for the contention that the instructions permitted conviction under the Robinson-Patman Act upon a finding of general intent rather than a specific purpose to destroy competition. The trial court carefully and repeatedly pointed out that Congress required proof of a predatory intent and that sales "which are made without any specific intent to destroy competition would not fall within the Act" (Tr. 7122–7124). Petitioner points to no language in the judge's Robinson-Patman instructions that permitted the jury, in contravention of the judge's repeated emphasis on specific intent, to convict on general intent. Petitioner refers (Pet. 22) only to a portion of the charge instructing the jury how to determine when sales are unreasonably low. The judge emphasized in that instruction that the standard of reasonableness is objective and external; as a familiar example of external standards of reasonable behavior, he gave the illustration of the workman who throws a beam from a scaffold in circumstances which persons of ordinary prudence would recognize as dangerous to life and limb (Tr. 7141–7144). The context clearly shows that the judge was not speaking of

intent and, as the court of appeals held, the jury was plainly not misled (Pet. A–27 to A–28).[8]

(*c*) Petitioner also urges (Pet. 23) this Court to review the trial judge's instructions on good faith meeting of competition. It contends that the trial court mistakenly treated this as a defense. But the jury had been clearly instructed that the government had to prove beyond a reasonable doubt the statutory elements of (1) sales "at unreasonably low prices [(2)] for the purpose of destroying competition or eliminating a competitor," and that "[i]f [meet]ing a lawful, equally low price of a competitor * * * is factually found to be the purpose of partciular sales below cost, then such an instance would neither be unreasonably low, within the meaning of the statute, nor would such sales be made with the predatory intent required by law" (Pet. A–193). Compare 372 U.S., p. 37.

This Court has made clear (372 U.S., p. 36) that the burden of coming forward with evidence on meeting competition lies with the defendant. The government is not required to negative defendant's possible justifications, for the latter is obviously best situated to develop exculpatory facts. See *Ben Hur Coal Company* v. *Wells*, 242 F. 2d 481 (C.A. 10), certiorari de-

[8] Petitioner attempts to support its argument in this respect by appending as a footnote to its printed version of the instructions a short extract from the Sherman Act portion of the charge dealing with general intent under Section 1 of that Act (Pet. 22, A–201, n.). But the jury clearly understood the different standards under the Sherman and Robinson-Patman Acts, for the judge had told them he would charge separately under the two statutes and he carefully did so (Tr. 6063; 7092–7116 (Sherman Act); 7116–7147 (Robinson-Patman)).

nied, 354 U.S. 910. Under the trial court's instructions, however, the government had the ultimate burden and it carried the risk of failing to overcome evidence from which the jury might sustain the defense. That is all petitioner could reasonably demand.

Petitioner says that its burden on meeting competition was made more difficult because the trial court's instructions contemplated that competing prices be lawful and actually in existence (Pet. 25). But this Court had expressly stated that sales below cost are not condemned when made in furtherance of "the need to meet a lawful, equally low price of a competitor." 372 U.S., pp. 36–37. See, also, *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746, 753–754; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 247, n. 14. And petitioner does not contend that there was any real issue at trial as to whether the prices charged by National's competitors in fact existed.[9]

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[9] Petitioner also complains that it was prejudiced with respect to "meeting competition" by two remarks contained in the instructions. The court warned the jury that a witness' conclusory statement that prices were cut to meet competition did not of itself resolve the issue. This was not an inappropriate warning since it had to be made clear to the jury that *it* was to decide this issue. In the same portion of the charge the court also referred to the familiar differentials in gasoline prices encountered by motorists among various service stations. This also was not inappropriate since price differentials between paper cartons and milk were characteristic of the pricing structure which the jury would have to consider in determining whether reductions were aimed at meeting or beating competition. These objections relate simply to minor details of a long and difficult instruction. They were illustrative only, and in context were not prejudicial.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

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